

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re Estate of JOSEPH I. VERELLEN TRUST.

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JEFFREY J. VERELLEN,

Appellant,

v

MITCHELL VERELLEN,

Appellee.

UNPUBLISHED

May 10, 2011

Nos. 296763; 297086

Macomb Probate Court

LC No. 2008-194528-TV

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Before: WILDER, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

In docket number 296763, appellant, Jeffrey Verellen, appeals by right the probate court's order awarding attorneys' fees in an amount less than requested. In docket number 297086, appellant appealed by right from the probate court's order that denied his motion for stay pending appeal. On March 26, 2010, this Court ordered that appellant's motion to stay was granted in part "limited to the automatic stay provided by MCL 600.867(1)." *In re Verellen Trust*, unpublished order of the Court of Appeals, entered March 26, 2010 (Docket No. 297086). The only issue before this Court is appellant's challenge to the probate court's order granting attorney fees. We vacate the order and remand for further proceedings.

**I. FACTS**

The underlying matter arises from probate of the estate of Joseph Verellen, who left all or most of his property in a testamentary trust that named appellant, his son, as successor trustee. The decedent passed away in December 2007. The trust assets were worth approximately \$1.9 million and were divided among Joseph Verellen's 13 children. Appellee, Mitchell Verellen, was the residuary beneficiary of the trust. Appellant accepted the trust and proceeded to administer it unsupervised. The estate was large with a multitude of real property assets, handwritten notes, ademption issues, and numerous beneficiaries. Eventually, there was a disagreement regarding the trust's administration.

In February 2008, appellant hired the law firm of Rickard, Denney, and Garno (RDG) to assist him in administering the trust. Appellee also sought the advice of counsel, although the parties continued to work toward a resolution. On August 15, 2008, appellee filed a petition for supervised administration of the trust based on his perceived lack of cooperation on appellant's

part. The parties continued their attempts to reach a settlement, however, and appellee's petition was dismissed on October 8, 2008. Then, on February 3, 2009, one of the other children, Mary Pallister, filed a petition for supervised administration of the trust. Appellee filed a concurrence at the beginning of March. At this point, informal discussions ceased.

On March 13, 2009, the probate court granted Pallister's petition. Appellant was ordered to "as soon as practicable" make the specific cash distributions called for in the trust and make an interim distribution to appellee of the residuary. The probate court also ordered the parties to attend facilitation. On March 20, 2009, appellee filed a petition to remove appellant as trustee. On April 20, 2009, the parties attended facilitation, which ended when appellee walked out. Contentious litigation continued throughout the year.

In mid-December 2009, hearings were held to determine RDG's attorney fees. The parties blamed each other for the extended time the trust had been in probate. RDG asked for approximately \$131,000 in attorney fees. It had received a \$55,000 retainer from the trust when representation began in August 2008, an amount RDG believed reasonable based on anticipated litigation. One of the firm's attorneys had already billed and been paid \$5,000. Thus, by the end of August 2008, RDG had received \$60,000. On April 14, 2009, RDG received an additional \$25,000 retainer because the initial retainer had been used. During the proceedings, the probate court allowed \$5,640 in attorney fees and costs for April 6, 2009, through April 30, 2009. Testimony by one of the RDG attorneys involved substantiating particular billing entries in regard to the reasonableness of the amount of hours. RDG also called an expert witness to testify regarding the services rendered and the hourly rate.

At the end of the hearing's second day, the trial court found that appellee had not shown by clear and convincing evidence that RDG did not perform the work for which it billed. The trial court set the billing rates for attorney and legal assistant work based on appellant and RDG's retainer agreement, \$150 and \$75 per hour respectively. It found the majority of attorney fees were reasonable, in light of the work done, the expertise needed, and the benefit the trust derived from the work. However, it clarified that RDG could not obtain attorney fees for its efforts trying to obtain attorney fees, which seemed to constitute a large portion of the recent bills. The court instructed that the parties make the necessary adjustments to RDG's bill and it would sign an order. Instead, appellee opted to continue the hearing to present further evidence.

The evidentiary hearing continued on February 5, 2010. After adjusting the hourly rates, RDG's bill totaled about \$115,000. Appellee's counsel believed the total was \$90,500, the difference being March 2009 charges that he believed the court had previously not allowed. After additional testimony from appellant's counsel, appellee called an expert witness. The witness found numerous billings by RDG that he believed were unreasonable and did not aid the trust. The probate court took RDG's request for attorney fees under advisement pending a review of the evidence submitted. It awarded RDG \$41,835.65 in attorney fees and \$298 in costs (\$42,127.65 total), but provided no reasoning for its decision. RDG was required to return all funds it had received in excess of this amount.

## II. STANDARD OF REVIEW

The decision whether to award attorney fees and the determination of the reasonableness of the fees are reviewed on appeal for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). An abuse of discretion occurs when the court's decision is outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). The findings of fact underlying an award of attorney fees are reviewed for clear error. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake was made. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 296; 769 NW2d 234 (2009). We give due deference to the probate court's superior ability to judge the credibility of witnesses appearing before it. MCR 2.613(C); *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004).

## III. ANALYSIS

When attorney fees are awarded, the amount awarded is for reasonable fees, not actual fees. See *Smith*, 481 Mich at 528 n 12. The burden of proof regarding reasonableness rests on the party claiming compensation. *Id.* at 528-529. There is no precise formula for assessing the reasonableness of an attorney fee. *Temple Marital Trust*, 278 Mich App at 138. However, factors that must be considered include:

(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Smith*, 481 Mich at 529, quoting *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982).]

Also, a trial court should consider the overlapping factors listed in the Michigan Rules of Professional Conduct:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent. [*Smith*, 481 Mich at 529-530, quoting MRPC 1.5(a).]

The *Smith* Court held that

a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services, i.e., factor 3 under MRPC 1.5(a). In determining this number, the court should use reliable surveys or other credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case (factor 1 under MRPC 1.5[a] and factor 2 under *Wood*). The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee. We believe that having the trial court consider these two factors first will lead to greater consistency in awards. Thereafter, the court should consider the remaining *Wood*/MRPC factors to determine whether an up or down adjustment is appropriate. And, *in order to aid appellate review, a trial court should briefly discuss its view of the remaining factors*. [*Smith*, 481 Mich at 530-531 (emphasis added).]

“To the extent a trial court considers any factor not enumerated in *Wood* or MRPC 1.5(a), the court should expressly indicate this and justify the relevance and use of the new factor.” *Id.* at 531 n 15.

As discussed, before the last day of the evidentiary hearing and before reviewing the billing records itself, the probate court orally stated that the majority of fees were reasonable and appellee had not shown that the work alleged was not actually performed. Yet, the court ultimately awarded RDG less than one-third of the adjusted fees it requested. Because the probate court did not state the reasons for its award, it is unknown what factors caused the court to find that only such a reduced amount was reasonable. Our Supreme Court has indicated that while a court is not required to detail its specific findings on the record in regard to the *Wood*/MRPC factors, it should at least briefly discuss them in order to facilitate appellate review. *Id.* at 530-531; *Wood*, 413 Mich at 588. Due to the lack of specific reviewable findings underlying the probate court’s award decision and significant difference between actual and awarded fees, we vacate the probate court’s order and remand in order for the probate court to state its findings underlying its award decision. *JC Bldg Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 430-431; 552 NW2d 466 (1996) (remand necessary because this Court not satisfied that lower court considered the appropriate factors where it made no findings on the record). The trial court shall articulate its findings and the reasons for them, in a written opinion and order.

Remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder  
/s/ William C. Whitbeck  
/s/ Karen M. Fort Hood